IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 11TH OCTOBER 2007 / 19TH ASWINA 1929

SA.No. 122 of 1994(F)

AS.95/1989 of I ADDL. DISTRICT COURT, KOLLAM
OS.617/1984 of MUNSIFF COURT, KARUNAGAPPALLY
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APPELLANTS/ APPELLANTS/ DEFENDANTS 1 TO 4
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1. **A.GANGADHARAN, KAREETHRA THEKKATHIL FROM PULIMOOTTIL, KOTTACKUPURAM MURI, ATHINADU VADAKKU, KULASEKHARAPURAM VILLAGE.**

2. **G.RAVEENDRAN OF DO. DO.**

3. **G.VIDYADHARAN OF DO. DO.**

4. **R.RATNAKARAN OF DO. DO.**

BY ADV. SMT.C.G.BINDU
SMT.C.G.AJITHA

RESPONDENT/ RESPONDENT/ PLAINTIFF

P.BASHEER AHAMMAD, VALIYAPARAMBIL VEEDU, CLAPPANA THEKKUM MURI, PERINADU VILLAGE.

BY ADV. SRI.S.PARAMESWARAN
SRI.K.N.CHANDRABABU

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11/10/2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SA. NO.122/1994

ORDER ON CMP. NO.175/1994 IN SA. NO.122/1994

DISMISSED

11.10.2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A. TO JUDGE

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M.SASIDHARAN NAMBIAR, J.

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S.A.No. 122 OF 1994

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DATED THIS THE 11th DAY OF OCTOBER, 2007

JUDGMENT

Defendants in O.S.617 of 1984 before Munsiff Court, Karunagappally are the appellants. Respondent is the plaintiff. Respondent instituted the suit seeking a decree for permanent prohibitory injunction restraining appellants from trespassing into the plaint schedule property contending that plaint schedule property having an extent of 3 acres 86 cents belongs to respondent and his wife as per Ext.B1 sale deed of 1984 and on the south-western portion of the property a shop building was constructed by the previous owner and was let out to the first appellant for a monthly rent of Rs.20/- and there are seven yeilding coconut trees in the property and respondent is residing in Tamil Nadu and comes to the place only rarely and when respondent came to the property on 3.12.1984 it was seen that four coconut sapplings were planted in the property and he filed a complaint before the police but four coconut trees aged 12 years standing in the property were found cut and removed. Alleging that appellants have no right or possession over the property, a decree for permanent prohibitory injunction

restraining the appellants from trespassing into the plaint schedule property was sought.

2. Appellants 1 and 2 in their joint written statement contended that first appellant has already filed O.S.559 of 1984 in respect of 20 cents of land in Survey No.401/3 including the disputed portion of the plaint schedule property and already obtained an order of temporary injunction against respondent. It was further contended that the said 20 cents is on the western portion of one acre 29 cents in Survey No.401 and was enjoyed by the first appellant who reclaimed that portion and the shop building was constructed by Lakshmanan on the basis of permission given to him by first appellant and Lakshmanan had surrendered the building in favour of first appellant in 1980 and thereafter he has been in possession of the property and respondent is not entitled to a decree for injunction in respect of the said property. In O.S.559 of 1984, a suit instituted by first appellant a decree for injunction was sought for which is in respect of the 20 cents, against respondent and some others. Both suits were jointly tried.

3. On the side of appellants herein, seven witnesses were examined. On the side of respondent, six witnesses were

examined. Exts.A1 to A5, Exts.B1 to B3, Exts.X1 to X4 and C1 were also marked. On the evidence, learned Munsiff found that respondent obtained the property under Ext.B1 assignment deed. It was also found that the reclaimed portion of the property including the building is in the possession of first appellant and respondent is only in possesssion of the balance extent of plaint schedule property in O.S.617 of 1984. Therefore both suits were partly decreed. In O.S.559 of 1984, a decree was granted in favour of first appellant restraining respondent and others from trespassing into the reclaimed portion of the property including the building. In O.S.617 of 1984, a decree for injunction was granted in favour of respondent, restraining appellants from trespassing into the plaint schedule property therein except the building and western reclaimed portion of the property. Challenging the decree and judgment, appellants filed A.S.95 of 1989 and A.S.96 of 1989 and respondent filed A.S.106 of 1989 and A.S.107 of 1989 before District Court, Kollam. Learned Additional District Judge heard all the appeals together. As per common judgment, he dismissed all the appeals. Plaintiffs in O.S.617 of 1984 did not prefer an appeal against the common judgment. First appellant challenging the concurrent

decree in O.S.559 of 1984, filed S.A.159 of 1994 which was subsequently dismissed for default on 28.2.2006. S.A.122 of 1994 is filed challenging the concurrent decree passed in O.S.617 of 1984.

4. Second appeal was admitted formulating following substantial questions of law.

1. When Ext.B1 sale deed does not show that the property is inclusive of the shop building or trees, whether the finding of courts below that respondent is entitled to a decree for permanent prohibitory injunction in respect of 20 cents of the property claimed by appellants is sustainable.

2. Whether appreciation of evidence by courts below is in the proper perspective and finding regarding possession of unreclaimed portion of 20 cents of property is sustainable.

5. Learned counsel appearing for appellants was heard. The argument of the learned counsel for appellant is that the report of the Commissioner with the evidence of PW5 the Commissioner, establish that the disputed 20 cents was enjoyed as one plot by appellants and respondent has also no case that portion of 20 cents was enjoyed separately and in such circumstances courts below should not have granted a decree in

favour of respondent in respect of portion of 20 cents on the ground that it is the unreclaimed portion. It was also argued that on a proper appreciation of evidence, courts below should have found that appellants are in possession of the entire 20 cents and respondent has not established his possession of the unreclaimed portion of 20 cents and the decree granted in respect of the unreclaimed portion of 20 cents is unsustainable.

6. Both the suits O.S.559 of 1984 and O.S.617 of 1984 are suits for injunction. Trial court did not frame any issue on the question of title. The only question considered was on possession of the disputed property. The right obtained by respondent under Ext.A1 was not challenged, except to the extent that it does not take in the disputed portion of the 20 cents. Anyway being a suit for injunction, question of title to the disputed 20 cents is not to be considered in the suits and rightly courts below did not consider that question.

7. A decree for injunction can be granted only if possession of the plaint schedule property is established. True, respondent is entitled to a decree in respect of the plaint schedule property, including the disputed unreclaimed portion of 20 cents, only on establishing possession of that property. Even

if appellants did not succeed in establishing their possession, if respondent did not establish his possession, a decree for injunction cannot be granted. But when the suit was tried along with another suit filed by first appellant, where first appellant sought a decree for permanent prohibitory injunction in respect of the disputed 20 cents, the burden to prove possession of 20 cents is equally shared by appellants also. The specific case of first appellant in O.S.559 of 1984 was that he is in possession of the disputed 20 cents of the property. Therefore if first appellant could not succeed in proving his possession of 20 cents claimed in O.S.559 of 1984, that would definitely be a relevant factor to consider the question whether respondent is in possession of the disputed property in the other suit. Trial court on the evidence found that disputed 20 cents is not in possession of one party. It was found that portion of the 20 cents was reclaimed and in the reclaimed portion there is a shop building. With regard to that reclaimed portion of the disputed 20 cents, it was found that its possession is with first appellant. It is for that reason, a decree to that extent was granted in O.S.559 of 1984, which has now become final. With regard to the unreclaimed portion of 20 cents, which is also part of the plaint

schedule property in O.S.559 of 1984, it was found that first appellant is not in possession of the said property. Trial court and first appellate court on appreciation of evidence entered a factual finding that the unreclaimed portion is in possession of respondent and not in the possession of appellants. The argument of learned counsel is that this court has to reappreciate the evidence and substitute the finding of this court to that of the courts below. Exercising the powers of this court under Section 100 of Code of Civil Procedure, it is not possible to reappreciate the evidence and substitute the finding of this court to that of the courts below. The question whether appellants are in possession or respondent is in possession of the disputed portion is a finding of fact. The finding of fact by the first appellate court is final. There is no merit in the appeal. Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR, JUDGE

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